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Deposited in DRO:

20 June 2012

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Spaventa, E. (2011) 'The horizontal application of fundamental rights as general principles of Union Law.', in A constitutional order of states : essays in honour of Alan Dashwood. Oxford: Hart Publishing, pp. 199-218.

Further information on publisher's website:

<http://www.hartpub.co.uk/books/details.asp?isbn=9781849460460>

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The Horizontal Application Of Fundamental Rights As General Principles Of Union Law

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I INTRODUCTION

The peculiarity of the constitutional order of States is fully reflected in the difficulties inherent in delimiting the exact scope of Union law. This is true both in relation to fleshing out the Treaty provisions (especially those declared to grant rights to individuals); and in relation to the effect of the general principles of Union law, and particularly fundamental rights, on the domestic constitutional systems. In this respect, the interaction between the ever expanding scope of the Treaty rights-granting provisions (mainly of the Union citizenship and the free movement provisions), and the general principles has created a complex web of intersecting jurisdictions where domestic, Union and European Convention rights concur, as well as sometimes compete, with one another. As a result, the determination of the 'proper' scope of application of Union fundamental rights is of paramount constitutional importance – the broader the scope of the former, the deeper the impact on both national regulatory sovereignty and national conceptions of fundamental rights.

Here, it should be noted that this is not a zero sum game, where gain and losses can be exactly determined so that a 'gain' at EU level exactly corresponds to a 'loss' at national level (or vice versa): first of all, a loss in national sovereignty might well be compensated by the gain in individual rights; secondly, fundamental rights, and especially the balance between competing interests, reflect cultural and social values and anxieties so that a loss in national sovereignty might also determine a loss in societal compromises, in the collective dimension, in favour of an individualistic (and possibly selfish) view of mutual rights and responsibilities; thirdly, an individual's gain might translate in another individual's loss, regardless of whether there has been a gain to the national or Union dimension; fourthly, a 'gain' in the Union's jurisdiction is also a gain for a certain vision of the European Union (more supranational, more constitutionally independent from its Member States). This contribution does not seek to explore all of these issues, although it touches upon them; rather it focuses on exploring the extent to which fundamental rights as general principles of Union law can (or/and should) be invoked against other individuals. More generally, an investigation into those issues might help in answering one of the main questions Alan has been interested in: if the Union can correctly be described as a constitutional order of States, which 'constitutional' order is this?

I will first look at the scope of application of fundamental rights as general principles of Union law to then concentrate on those situations in which fundamental rights apply to acts of the Member States. I will then analyse the extent to which general principles, and fundamental rights in particular, are horizontally applicable and look at some reasons why these developments might not be altogether wise.

II THE SCOPE OF APPLICATION OF FUNDAMENTAL RIGHTS

It is well known that, lacking any express reference to fundamental rights in the original Treaties, the European Court of Justice held that fundamental rights formed part of the general principles of

(then) Community law which it would protect.¹ The political institutions, in turn, endorsed this case law first by means of a political declaration,² then through Treaty revisions³ and most importantly through the declaration of the Charter of Fundamental Rights,⁴ which following the entry into force of the Treaty of Lisbon has become 'officially' legally binding.⁵ As for the sources of those rights, pre-Charter, the Court mainly referred to the European Convention of Human Rights,⁶ the common constitutional traditions,⁷ as well as other international instruments of fundamental rights protection.⁸

Whilst the fact that the Union should be bound by fundamental rights is not generally contested, the extent to which such fundamental rights might also permeate in the domestic legal system is more controversial. Thus, when discussing the scope of application of fundamental rights as general principles of Union law, we need to distinguish three possibilities: first of all, the applicability of fundamental rights in relation to acts of the EU institutions; secondly, those cases where

¹ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

² *Joint declaration of Council, Commission and Parliament concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1977] OJ C103/1.

³ Starting with the Maastricht Treaty (but already in a Preamble to the SEA) every Treaty revision contained a fundamental rights element; see generally A Arnall, A Dashwood, M Dougan, M Ross, E Spaventa, D Wyatt, *Wyatt and Dashwood's EU Law* 6th edn, (London, Sweet and Maxwell, 2006) ch 7.

⁴ Charter of Fundamental Rights of the European Union, [2000] OJ C364/1 (Nice version); the original version has been then modified (amended version [2010] OJ C83/02). Hereinafter, all references to the Charter or the Charter of Fundamental Rights refer to the amended version now in force.

⁵ Art 6 TEU. The Court, as well as its Advocates General (eg Case C-341/05 *Laval un Partneri* [2007] ECR I-11767), had already extensively referred to the Charter before its official entry into force; given that in theory the Charter is only codifying existing rights such references are less problematic than it might be thought at first sight.

⁶ eg Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219. The EU is due to accede to the ECHR (Article 6(2) TEU); see also Protocol (no 8) Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms ([2010] OJ C83/273). The negotiations for accessions have now started (see Press Release IP/10/906, 10 July 2010) and Justice and Home Affairs Council Press Release, 3-4 June 2010, 10630/1/10/REV 1. See also Draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Involvement of the ECJ regarding the Compatibility of legal acts of the Union with fundamental rights*, Doc no 10568/10 (2 June 2010); and *Co-Respondent Mechanism*, Doc No 10569 (2 June 2010). For reasons better known to the Council the Draft Council Decision authorising the Commission to negotiate is classified (Doc no 9689/10 - request for access denied). See also *Discussion Document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms*, document of 5 May 2010 (unnumbered), available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf.

⁷ Eg Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold v Commission* [1974] ECR 491.

⁸ Generally eg Case 4/73 *Nold v Commission* [1974] ECR 491.

fundamental rights as general principles of Union law apply to the acts of the Member States implementing Union law; and thirdly, those cases in which fundamental rights apply because the matter falls within the scope of application of Union law. We will briefly analyse the scope of application of fundamental rights in relation to acts of the EU institutions, to then concentrate on those instances in which fundamental rights apply to the acts of the Member States, as a result of a connection with EU law. We shall then focus on the possibility that fundamental rights as general principles of Union law might have direct and/or indirect horizontal effects in litigation between private parties.

III FUNDAMENTAL RIGHTS AGAINST THE EU

As mentioned above, this is the least controversial of categories. When the EU acts as a regulator, or as an administrative body, it is bound by the Charter as well as by the general principles.⁹ Here fundamental rights are capable of having direct effect, ie to provide individuals with a cause of action against the EU institutions. Of course, not all rights listed in the Charter are capable of having such an effect, and the more programmatic or inspirational rights would have more limited application since the margin of discretion left to the legislature would presumably be broader.¹⁰ Aside from traditional judicial review cases, where individuals rely on fundamental rights to challenge the acts of the institutions, it is difficult to imagine a situation in which fundamental rights might be invoked against another individual. In this respect, it is just conceivable that an employee of one of the EU institutions might attempt to rely on the Charter against another employee; and yet, in these instances their relationship should be governed either by EU rules (in which case there would not be any horizontal effect but rather either a vertical or an incidental effect); or by the relevant national law (according to where the institution is located).

In those cases in which fundamental rights are invoked against the EU institutions, the standard of fundamental rights protection is (or should be)¹¹ solely that decided by the Union judicature, with the proviso that the level of protection cannot fall below that set by the European Convention of Human Rights.¹² Of course, this might create tensions should the standard of protection afforded by the Union judicature fall considerably below that afforded at national level,¹³ and yet, both Union and national judicatures seem to be well intentioned to avoid such conflicts.¹⁴

⁹ Although in this context the distinction seems rather redundant and due to disappear.

¹⁰ See the rather unhelpful distinction between principles and rights, Article 52(5) Charter of Fundamental Rights.

¹¹ Although in the terrorist cases the General Court seems to have delegated, at least to a certain extent, the protection of the claimants' fundamental rights to the national courts; see E Spaventa, 'Annotation on the PMOI cases' (2009) 46 CMLRev 1239.

¹² See Article 52(3) Charter of Fundamental Rights of the EU.

¹³ There was a danger of a conflict of this type in the German bananas saga in relation to Regulation 404/93 on the common organization of the market in bananas [1993] OJ L47/11; here some German courts deemed the Regulation to be incompatible with the traders' right to property; the issue was eventually settled by the German Federal Constitutional Court which restated the so called Solange II case law, refusing to scrutinise the compatibility of the Regulation with fundamental rights as protected by the German Constitution (see Federal

IV FUNDAMENTAL RIGHTS AGAINST THE MEMBER STATES WHEN IMPLEMENTING UNION LAW AND WHEN ACTING WITHIN ITS SCOPE – VERTICAL SITUATIONS

More controversially, European Union fundamental rights can also be invoked against the Member States when they are either implementing EU law, or acting within its scope.¹⁵ We will briefly recall the extent of the Member States' duty in both situations.

A Fundamental rights when implementing Union law

When the Member State is exercising discretion in implementing EU law,¹⁶ it has to respect the constitutional principles of the EU, including fundamental rights. The reason for this obligation is that the Member State in such cases is acting as an agent of the EU and therefore cannot overstep the constitutional limits that constrain the latter. However, the extent of this obligation was not altogether clear: the pre-Charter case law, starting from the *Wachauf* case,¹⁷ seemed to limit the effect of fundamental rights to a duty of consistent interpretation so that the national act/rule implementing Union law would have to be interpreted 'in so far' as possible in a way that was consistent with Union fundamental rights. In other words, the case law seemed not to impose a duty to disapply national rules implementing Union law when those conflicted with EU fundamental rights.¹⁸ However, such a restrictive reading would have been inconsistent with the case law on the scope of fundamental rights when Member States act within the scope of Union Law (see below) where the national court's obligation is more far reaching and extend to a duty to disapply national law when inconsistent with Union fundamental rights.

Constitutional Court, decision 7/6/00 [2000] Human Rights Law Journal 251). See generally, U Everling, 'Will Europe Slip on Bananas? The Bananas Judgement of the Court of Justice and National Courts' (1996) 33 CMLRev 401; N Reich, 'Judge made 'Europe à la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation' (1996) EJIL 103; C U Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's 'Banana Decision'' (2001) ELJ 95.

¹⁴ See the 'happy' ending to the bananas saga; and also the reactions to the legal challenges against the European Arrest Warrant; see eg German Constitutional Court's ruling declaring the German legislation implementing the European Arrest Warrant void but not engaging with the compatibility of the EAW with fundamental rights, decision of 18 July 2005, 2 BvR 2236/04 (press release in English available at <http://www.bundesverfassungsgericht.de/en/press/bvg05-064en.html>); see also H Satzger and T Pohl, 'The German Constitutional Court and the European Arrest Warrant: "Cryptic Signals" from Karlsruhe' (2006) 4 Journal of International Criminal Justice 686. See also Protocol (no 35) on Article 40.3.3. of the Constitution of Ireland ([2010] OJ C83/321) which was a direct reaction to the challenge brought in Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685 to the Irish rules on advertising of abortion services in other Member States.

¹⁵ See eg the rather confused (and of dubious legal usefulness) Protocol (no 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom ([2010] OJ C83/313).

¹⁶ If there were no discretion the potential fundamental rights breach would be ascribable to the EU, not to the Member State (eg Case C-84/95 *Bosphorus* [1996] ECR I-3953; and in front of the ECHR App No 45036/98).

¹⁷ Case 5/88 *Wachauf* [1989] ECR 2609; C-20/00 and C-64/00 *Booker Aquaculture Ltd at al v Scottish Ministers* [2003] ECR I-7411.

¹⁸ For this interpretation see T Hartley, *The Foundations of European Community Law* 5th edn (Oxford, OUP, 2003), 146, footnote 60.

In any event, the debate seems now to be obsolete since the Charter does not contain such a limitation rather expressly binding the Member States when they implement EU law.¹⁹ Therefore, post-Charter, there should not be any doubt that an individual might bring proceedings against a Member State when the latter in implementing EU law infringes European Union fundamental rights. Furthermore, in those cases, it is open to an individual to rely also on national fundamental rights since, if a discretion is conferred, Member States are under a dual obligation to respect both Union and national fundamental rights (and of course in any event to respect the ECHR). So when a Member State is implementing Union law, the applicable fundamental rights standard is the highest between the national and the EU one.

A different, and more complex question, to which we shall return later, is whether the Member State is bound by Union fundamental rights when it should have implemented Union law but it has not, i.e. in the absence of any legislative provision.

B Fundamental rights when acting within the scope of Union law

Member States are also bound by Union fundamental rights when they act within the scope of Union law,²⁰ ie when they limit a right granted by Union law. Here, in *ERT* and *Familiapress*²¹ the Court made clear that when the Member State is invoking a Treaty derogation or a mandatory requirement in order to justify limiting one of the Treaty free movement rights, it must respect fundamental rights as general principles of Union law. This interpretation is more contested as it has been seen as an undue interference with national sovereignty:²² after all, the Member States have their own system of fundamental rights protection which can be relied upon in those situations; and, it is argued, the very fact that the Member State is derogating from a free movement right should place it outside the reach of Union law. However, in this author's opinion, this case law is entirely consistent with the Union's own constitutional premises: when a Member State is limiting, or derogating from, a Treaty provision it must respect the Treaty and its constitutional principles. Much in the same way as any limitation/derogation from these rights must be proportionate, it must also respect fundamental rights. This said, the continuing expansion of the scope of the free movement provisions, the fact that the link between barrier and rule contested might be extremely tenuous,²³ so that the free movement provisions might become a simple vehicle for the enforcement of

¹⁹ Article 51(1) Charter of Fundamental Rights of the EU.

²⁰ Fundamental rights are also relevant as an aid to interpretation, eg 222/84 *Johnston v Chief Constable of Royal Ulster* [1986] ECR 1651; C-13/94 *P v S Cornwall County Council* [1996] ECR I-2143.

²¹ Case C-260/89 *ERT* [1991] ECR I-2995; Case C-368/95 *Familiapress* [1996] ECR I-3689; to an extent this was to be expected already following the ruling in Case 36/75 *Rutili* [1975] ECR 1219.

²² See eg F Jacobs, 'Human Rights in the European Union: the role of the Court of Justice' (2001) 26 *ELRev* 331, which is however rather inconsistent with his more generous approach in his opinion in Case C-168/91 *Konstantinidis* [1993] ECR I-1191.

²³ Case C-60/00 *Carpenter* [2002] ECR I-6279.

fundamental rights is clearly constitutionally problematic.²⁴ But the reason for that particular problem lies in the expansion of the scope of the Treaty rather than in the application of fundamental rights to limitations and derogations. And yet, it is this fear of an undue expansion of the scope of Union law towards establishing some sort of free standing Union fundamental rights that explains why the scope of the Charter is limited to the actions of the Member States when implementing, rather than also acting within the scope of, Union law.

Having briefly recalled the scope of application of fundamental rights against the acts of the Member States it is now time to consider the extent to which fundamental rights as general principles of Union law might be relied upon in litigation against private parties (horizontal application) by virtue of the fact that the situation has a connection with Union law. Here we will start by analysing those cases in which private parties rely on the general principles to displace national law (incidental horizontal application), to then turn to pure horizontal effect cases, i.e. where there is no provision in national law.

V INCIDENTAL HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS AS GENERAL PRINCIPLES OF UNION LAW

Having dealt with vertical situations, it is now time to address the extent to which the general principles of Union law, and in particular fundamental rights, apply in horizontal situations. Here the answer is far from clear, both because of the paucity of case law, and because of the very nature of the problem which raises complex constitutional and policy issues.²⁵ In order to attempt disentangling the matter, we will first analyse those cases in which (A) national rules falling within the scope of the Treaty are incompatible with a general principle of EU law and are invoked in litigation between private parties; we shall then turn our attention to (B) the same situation involving a Directive rather than the Treaty (*Mangold*-type situation).

A Incidental Horizontal Application – Situations Falling within the Treaty

It has been mentioned before that when a national rule falls within the scope of the Treaty, either because the rule is giving effect to one of its provisions or because it is limiting it, the national rule must comply also with the general principles of Union law, including fundamental rights.

The same principle applies when the national rule is invoked in litigation between private parties (as was the case in *Familiapress*),²⁶ so that a rule falling within the scope of the Treaty, in order to be compatible with Union law, must also comply with the general principles; if it does not, the national court will be under the same obligation to disapply it as if the rule were incompatible with one of the

²⁴ On this point see also E Spaventa, 'Seeing the Woods despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 CMLRev 13.

²⁵ See generally eg J Krzeminska-Vanvaka, 'Horizontal effect of fundamental rights and freedoms – much ado about nothing? German, Polish and EU Theories compared after *Viking Line*', Jean Monnet Working Paper 11/09; M Tushnet 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 International Journal of Constitutional Law 79; M Safjan and P Miklaszewicz 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law' (2010) Eur Rev Priv Law 475.

²⁶ Case C-368/95 *Familiapress* [1996] ECR I-3689.

Treaty provisions. The fact that such application of Union law might have effects on litigation between private parties is immaterial in the same way as it is immaterial when private parties rely on Article 34 TFEU, which is not horizontally applicable, against other private parties.

The only question in this respect is whether, in order to be able to invoke the general principles the Treaty provision which brought the matter within the scope of Union law must be directly effective: here, the answer seems to be positive. If the Treaty provision invoked is not directly effective there would be no cause of action and therefore Union law would not apply at all (unless of course there is a provision in secondary legislation that attracts the national rule within the orbit of Union law, of which more in the next section). The fact that the Treaty provision triggering the general principles needs to be directly effective is demonstrated by the rulings on age discrimination:²⁷ as it is well known, Article 19 TFEU, which provides Union competence in the field of discrimination on grounds of age, is not directly effective. In those cases, in order to be able to trigger the general principles the Court had recourse to secondary legislation, rather than the Treaty.

The application of the Treaty might also trigger the general principles in another way: here, when the Treaty provisions apply horizontally (such as in the case of the free movement provisions and sex discrimination), private parties have been allowed to rely on the general principles to attempt to resist the application of the Treaty. This was particularly the case in *Viking* and *Laval* and will be the subject of detailed analysis below.²⁸

B Incidental Horizontal Application – Situations Falling Within a Directive (*Mangold*-type)

If the application of the general principles in situations which fall within the scope of Union law by virtue of a directly effective Treaty provision is relatively straightforward, the situation in relation of matters falling within the scope of Union law by virtue of secondary legislation is more complex.²⁹ We will first briefly recall the case law, to then assess whether it is constitutionally sound.

²⁷ eg Case C-144/04 *Mangold* [2005] ECR I-9981; Case C-555/07 *Kücükdeveci*, judgment of 19 January 2010.

²⁸ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767

²⁹ And more generally the debate on the extent to which Directives might have effects on individuals is still open; aside from Case C-194/94 *CIA Security International SA v Signalson SA* [1996] ECR I-2201; and Case C-443/98 *Unilever Italia Spa v Central Food Spa* [2000] ECR I-7535, which might be limited to a specific directive (83/189), see Case C-201/02 *Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723 (which in the writer's opinion Wells was not very surprising as it was a judicial review/vertical situation); Joined Cases C-152 to 154/07 *Arcor AG and Co KG, Communication Services TELE2 GmbH, Firma 01051 Telekom GmbH v Bundesrepublik Deutschland* [2008] ECR I-5959; on these cases see the interesting contribution by R Král, 'Questioning the Limits of Invocability of EU Directives in Triangular Situations' (2010) 16 European Public Law 239. In Joined Cases C-37 and 58/06 *Viamex and Agrar Handels GmbH v Hauptzollamt Hamburg-Jonas* [2008] ECR I-69, the Court upheld the validity of a Regulation which provided that in order to qualify for an export refund for live animals the conditions provided for in Directive 91/628 would have to be respected. Critical of this approach P Craig, 'The legal effect of Directives: policy, rules and exceptions' (2009) 34 ELRev 349, who interprets this case as a further relaxation of the no horizontal direct effect rule because, through the medium of a Regulation, a Directive is capable of producing legal effects vis-à-vis a private party.

It is well known that in *Mangold* the Court applied a general principle to a horizontal situation.³⁰ It might be recalled that in that case the issue related to a dispute (possibly fictitious) between two private parties as to whether a German rule which allowed a derogation from the general limitations on the use of fixed term contracts for workers above the age of 52 was compatible with (then) Community law. Directive 2000/78 establishing a general framework on equal treatment,³¹ including equal treatment regardless of age, was of limited help to the claimant since the time limit for implementation had not yet expired. This notwithstanding the Court held that (i) the principle of non-discrimination on grounds of age was a general principle of Community law; (ii) that the matter at issue fell within the scope of (then) Community law by virtue of Directive 1999/70 on the framework agreement on fixed-term work;³² and that therefore (iii) the national court was under an obligation to provide the legal protection necessary to ensure that the principle of non discrimination on grounds of age could be fully effective also by setting aside any incompatible national rule.

The *Mangold* ruling gave rise to intense criticism from both Advocates General³³ and scholarship (not least by Alan Dashwood himself),³⁴ both because of its far reaching implications and because of the ease with which the Court discovered a 'new' general principle.³⁵ And yet, despite the negative reactions, *Mangold* has been confirmed in subsequent case law. In particular, in *Kücükdeveci*³⁶ the Court again applied the general principle of non discrimination on grounds of age in litigation between private parties. In that case, German rules provided that work completed before the age of 25 should not be taken into account in the calculation of the notice period required for lawful dismissal. As a result, Ms Küçükdeveci benefitted from a shorter period of notice from her employer, a private company, than it would have otherwise been the case. This time, the period for implementation of Directive 2000/78 had expired; and yet, since the litigation was between private parties, and since directives are not capable of being applied to horizontal situations, Directive

³⁰ Case C-144/04 *Mangold* [2005] ECR I-9981.

³¹ Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (2000) OJ L303/1.

³² Directive 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (1999) OJ L175/43.

³³ Several Advocates General have criticised the Court's decision in *Mangold*; eg AG Mazák in Case C-411/05 *Falacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531; AG Ruiz-Jarabo Colomer in Joined Cases C-55 and 56/07 *Michaeler and Others* [2008] ECR I-3135; AG Kokott in Case C-73/07 *Tietosuoja v Järvelin* [2008] ECR I-9831; more open AG Sharpston in Case C-427/06 *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245, esp paras 79-85 (however, in that case, both the AG and the Court found that the matter fell outside the scope of (then) Community Law so that the general principles did not apply).

³⁴ See Editorial Comment 'Horizontal Direct Effect: A Law of Diminishing Coherence' (2006) 43 CMLRev 1.

³⁵ Although to be fair to the Court given that the right not to be discriminated against on grounds of age had been included in the Charter; and that the Charter was merely a codifying rather than an innovative document, it should have not been such a surprise.

³⁶ Case C-555/07 *Kücükdeveci*, judgment of 19 January 2010.

2000/78 was of little use to the claimant. The Court restated that the principle of non-discrimination on grounds of age is a general principle of Union law; it then found that the German legislation at issue was inconsistent with Directive 2000/78. After having reaffirmed the lack of horizontal direct effect of Directives, and the limits of the duty of consistent interpretation, the Court instructed the national court of its duty to disapply, if need be, any provision of national law contrary to the general principle of non-discrimination on grounds of age.³⁷ At first sight then, the *Mangold* case law seems to imply that the general principles, including fundamental rights, are applicable whenever the situation falls within the scope of Union law, regardless of whether the trigger is the Treaty or a Directive, and regardless of whether the litigation is vertical or horizontal.

And yet, it has been argued³⁸ that *Mangold* does not support the view that general principles, and fundamental rights, are ‘truly’ horizontally applicable. In that case, it is argued, the Court merely instructed the national court not to apply the legislation breaching the general principle of Union law much in the same way as it would if a national rule breached Article 34 TFEU, which also does not have horizontal direct effect. Thus, for instance, rules imposing a non-justified product requirement cannot be invoked against a private party since they infringe EU law. Regardless of any spill-over effect on the contractual relationship between private parties, such application of Union law does not amount to horizontal effect. In order to appreciate the difference, take the following example: an individual enters into a contract with a supermarket in another Member State for the sale of her locally produced wine; the Member State enacts legislation prohibiting the sale of foreign wine; the supermarket attempts to rely on said legislation to get out of its contractual obligations but is prevented from doing so since the national court must, as matter of EU law, disregard the national rule which is inconsistent with the Treaty (vertical effect with incidental effects on individuals). On the other hand, take the case of an individual looking to sell wine produced in her own country; a small shop refuses to buy such wine since it specialises on products from another Member State; the individual would not be able to rely on Article 34 TFEU to force the shop to stock her wine (no horizontal effect).

The difference between the duty of national courts to disregard national rules inconsistent with the Treaty, and horizontal effects might appear at times counterintuitive and yet it is important in that in the first case there is no free standing cause of action, whilst when a piece of legislation applies horizontally it provides a free standing cause of action against another individual. It is with this in mind that some authors have argued that the *Mangold* ruling is less dramatic than it might appear at first sight: thus, we would not be dealing with horizontal effect of general principles; but rather with the normal application of the constitutional rules of the European Union, constitutional rules which are formed by the Treaty and the general principles of Union law. The only difference here would be

³⁷ The *Mangold* case law does not seem to be limited to age discrimination: in *Audiolux* (Case C-101/08 *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others, Bertelsmann AG and Others* [2009] ECR I-0000) the Court examined whether Union law encompassed a general principle of protection of minority shareholders; again, the litigation giving rise to the reference was between private parties and the matter fell within the scope of Union law by virtue of the company law directives. Whilst it found that there is no such principle in Union law, the fact that it accepted to analyse whether such a principle existed might be taken as an indication of the breadth of the *Mangold* approach (see below).

³⁸ See M Dougan in this volume.

that in some cases the situation falls within the scope of Union law by virtue of the Treaty; whilst in the *Mangold*-type of situation it would be brought within the orbit of Union law by virtue of a Directive. Seen in this way *Mangold* would not signal any great change in the constitutional principles of the EU rather being ‘surprising’ for the creative way in which the Court found the existence of a, previously unknown, general principle of non-discrimination on grounds of age.³⁹

And yet, from a constitutional perspective the analogy might need further reflection (and indeed there is no precedent for it – even in cases involving Treaty provisions a general principle was never applied to displace a national rule in cases concerning individuals). In cases relating to the Treaty, it is accepted that the Treaty provision (if directly effective) can be invoked to displace national rules regardless of whether it has a real horizontal effect: thus there is a correlation of effects between trigger and the effects acquired by the general principles by virtue of the trigger.

However, in the case of directives that is not the case: directives cannot be used to displace national rules in horizontal situations, and indeed, as said above, the Court has resisted calls for such ‘exclusionary’ effects in *Pfeiffer*.⁴⁰ So *Mangold* determines a rather curious constitutional effect whereby the directive triggers the application of general principles in a way which is broader than what could be achieved through the sole trigger. It is this dissonance between trigger and general principle to be both novel and problematic. Furthermore, if there is no longer a need for a similarity of scope between trigger and triggered principle, then there is no reason why such interpretation should not be of broader application so that it could be used to impose obligations on individuals beyond exclusionary effects. We shall now turn to this issue by analysing cases where there is no national rule that might be ‘excluded’ by the general principle.

VI THE EFFECT OF GENERAL PRINCIPLES IN THE ABSENCE OF CONFLICTING NATIONAL RULES – PURE HORIZONTAL EFFECT?

A Treaty provisions

We have mentioned above that in order to be compatible with the Treaty, a national rule limiting or giving effect to one of the Treaty provisions must be also compatible with the general principles of Union law (regardless of whether the situation is horizontal or vertical). In this regard, the general principles, including fundamental rights, apply exactly in the same way as the Treaty provision which brought the situation within the scope of Union law. However, the situation in respect of the effect of the general principles in the absence of national rules is more uncertain. Is it possible for a general principle to be capable of true horizontal direct effect, so that it can be invoked to impose obligations on private parties? And if yes, does the answer depend on whether the Treaty provision which acts as a trigger is itself capable of true horizontal effect? In order to answer this question we will first analyse the rulings in *Viking* and *Laval* to assess whether they provide authority either way.

It is well known that the rulings in *Viking* and *Laval* concerned litigation as to the compatibility of industrial action with the Treaty free movement of persons provisions. Two companies complained

³⁹ But see footnote 36.

⁴⁰ Joined Cases C-397/01 to 403/01 *Pfeiffer and others* [2004] ECR I-8835; see in particular AG Ruiz-Jarabo Colomer’s Opinion.

that such industrial action interfered with their free movement rights: in *Viking* the action was aimed at preventing the reflagging of a ship to another Member State;⁴¹ in *Laval* it was aimed at forcing the foreign company, which was posting its workers abroad, to enter into a local collective agreement.⁴² In both cases the companies were relying on the Treaty against the trade unions: a finding of incompatibility with Union law of the national rules regulating industrial action would in fact have been of little help to the claimants since the industrial action would have not been rendered unlawful. For this reason the companies relied on Articles 43 and 49 TEC (now 49 and 56 TFEU) arguing that the industrial action, directed at preventing movement in one case, and at imposing additional contractual obligations on foreign companies in the other, affected the rights to move within the European Union. In order to resist the companies' claims the trade unions relied, inter alia, on the right to strike as guaranteed by Union law. The Court accepted that the right to strike was a general principle of Union law and that it could be invoked to resist the companies' claims so as to justify the barrier to movement.⁴³ For this reason, it could be argued that *Viking* and *Laval* are authority to hold that, at least in those cases in which the Treaty is applied horizontally, the general principles are also horizontally applicable.

And yet, it is not obvious that we can infer all of this from those two cases. The horizontal application of the general principles in *Viking* and *Laval* was a by-product of the horizontal application of the Treaty provisions: they were used to curtail the scope of application of the free movement of persons, to ensure (or at least attempt to ensure) that, like almost any other right at national level, the economic free movement provisions would find some limit when clashing with other (non-economic) rights. In this respect, consider *Bosman*,⁴⁴ the precursor of horizontal application of the Treaty free movement of persons provisions: there the football association argued, inter alia, that the Court should refrain from allowing Article 39 TEC (now 45 TFEU) from having horizontal effect since private parties would not be able to invoke the Treaty derogations, which are linked to 'public' rather than 'private' interests and therefore would not apply to private parties.⁴⁵ The Court rejected this argument explicitly accepting that private parties might be able to

⁴¹ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

⁴² Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

⁴³ The Court therefore imposed its own vision of the appropriate ambit of the right to strike, see further E Spaventa, 'Federalization v Centralization: tensions in fundamental rights discourse in the European Union' in M Dougan S Currie (eds), *50 Years of the European Treaties* (Oxford, Hart Publishing, 2008), 343; see also eg C Barnard, 'Social Dumping or Dumping Socialism?' (2008) 67 CLJ 262; R O'Donoghue and B Carr, 'Dealing with *Viking* and *Laval*: from Theory to Practice' (2008-9) 11 CYELS 179.

⁴⁴ Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v Bosman and others* [1995] ECR I-4921; in the writer's opinion *Bosman* is not strictly speaking a horizontal effect case but rather a semi-horizontal (confirming the approach in Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405) since the rules at issue collectively regulated footballers contracts.

⁴⁵ Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v Bosman and others* [1995] ECR I-4921, para 85.

justify restrictions imposed on other people's Treaty freedoms.⁴⁶ Now, it seems clear that if private parties can objectively justify limitations imposed on other people's Treaty freedoms, then it follows that they can attempt to justify imposing a limitation on a Treaty freedom also because the limitation is due to the (legitimate) exercise of their own fundamental rights.⁴⁷

For this reason, it is difficult to say whether *Viking* and *Laval* might give any indication about whether general principles are capable of true horizontal application if for true horizontal application we mean the ability of a private party to rely on a general principle to impose obligations on another party, such as to impose obligations which little have to do with the exercise of Treaty rights. Thus, for instance, would a migrant worker be able to rely on the general principles of Union law to enforce her fundamental right, say her right to privacy or freedom of expression, against her employer merely by virtue of falling within the scope of the free movement of workers provisions? Would a tenuous link, such as the one established in the *Carpenter* case,⁴⁸ be enough to trigger Union fundamental rights against private parties? As far as this author is concerned, it is to be hoped that an individual who has exercised her right to move would not be able, for that sole reason, to invoke a fundamental right as general principle of Union law against a private party. We will come back to this issue in the last section.

B Directives

There is no case law to enlighten us as to the scope of application of the general principles, including fundamental rights, in situations in which a matter falls within the scope of Union law by virtue of a Directive, but where there is no national rule to be displaced. The issue arose in *Audiolux*,⁴⁹ where minority shareholders who had suffered a takeover bid from another company claimed that they should be protected by Union law, and in particular by the alleged general principle of equal treatment of minority shareholders. In their view, the principle of equal treatment should have afforded them a right to sell their shares to the acquiring company at the same conditions as the majority shareholders. The national court referred the case to the European Court of Justice asking it to address two separate (if obviously) related issues: first of all, whether such a general principle actually existed; secondly, whether general principles could be relied upon against private parties even in the absence of national rules. The Advocate General found that there was no general principle guaranteeing the equal treatment of minority shareholders. In the event that the Court's

⁴⁶ See also Case C-291/98 *Angonese* [2000] ECR I-4139.

⁴⁷ In fact, I would argue that the legitimate exercise of a competing fundamental right should not be qualified as a barrier at all, so as to escape from the centralising jurisdiction of the ECJ, and instead be left to the assessment of the national courts (subject to the principles of equality and effectiveness). Of course this is very far from being the Court's view, see also Case C-112/00 *Schmidberger* [2003] ECR I-5659. On the horizontal effect of the Treaty provisions and its application to contractual relations see also D Wyatt, 'Horizontal Effect of Fundamental Freedoms and the Right to Equality After *Viking* and *Mangold* and the Implications for Community Competences' (2008) 4 *Croatian Yearbook of European Law and Policy* 1.

⁴⁸ C-60/00 *Carpenter* [2002] ECR I-6279.

⁴⁹ Case C-101/08 *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others, Bertelsmann AG and Others* [2009] ECR I-0000.

assessment differed, she then proceeded to refute the idea that such a general principle could be invoked against a private party. The Court found that the proposed principle was not a general principle of Union law,⁵⁰ and hence avoided the question as to the effects of general principles on the relationship between private parties.

There is therefore no authority to suggest that the application of fundamental rights as general principles in cases falling within the scope of Union law by virtue of a Directive can be invoked against a private party beyond the 'exclusionary' effects endorsed by the *Mangold* case law. And yet, as we shall see in the next section, it is difficult to accept *Mangold* but then limit its scope.

VII SOME CONSTITUTIONAL OBJECTIONS AGAINST THE HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS

The analysis carried out above can be summarised in the following way:

Treaty provisions

- Any national legislation which falls within the Treaty to be compatible with it must also be compatible with the general principles of Union law, regardless of whether the Treaty is invoked in litigation between private parties (*Familiapress*), or in vertical situations (*ERT*, *Carpenter*).
- Treaty provisions must also be interpreted so as to be compatible with fundamental rights as general principles of Union law (*Schmidberger*); this means that when the Treaty is invoked by an individual against another individual, the scope of application of the Treaty provision (or the content of the Treaty right) finds its natural limit in the general principles (*Viking* and *Laval*).

Directives

- National legislation which falls within the scope of a directive must comply with the general principles of Union law, including fundamental rights (*Booker Aquaculture*). This is true even if a party is invoking the Union principle against another party in a way which would not be allowed under the Directive (*Mangold*).
- If a matter falls within the scope of Union law, by virtue of a directive, but there is no national rule which needs to be displaced by the general principle, then there is no authority to say that the general principle could be invoked against a private party.

Thus, the extent to which fundamental rights as general principles of Union law can be applied horizontally is not at all clear. In this respect, the *Mangold* case law poses very important

⁵⁰ *Audiolux*, para 63, 'The general principles of Community law have constitutional status while the principle proposed by Audiolux is characterised by a degree of detail requiring legislation to be drafted and enacted at Community level by a measure of secondary Community law. Therefore, the principle proposed by Audiolux cannot be regarded as an independent general principle of Community law.'

hermeneutic questions. Thus, it has been noted above that one of the striking elements of that case law is the dissonance between the scope of application of the trigger (Directive) and the scope of application of the general principle. This dissonance is important as it makes it more difficult to confine the *Mangold* case law to those cases in which the general principles are merely used to ‘displace’ (or exclude) conflicting national rules. In other words, even were one to share the enthusiasm shown by some of the scholarship for a constitutional distinction between effects which only determine the ‘exclusion’ of national law and those which entail a (allegedly more problematic) ‘substitution’ of the Union norm for the national one,⁵¹ there is no reason why *Mangold* should not apply also in ‘substitution’ cases. We are first going to look at this dissonance problem to then turn to the reasons why the current approach is not only constitutionally problematic but also practically untenable.

A The dissonance between trigger and triggered principle

It has been said above that if one were to be consistent, the *Mangold* approach cannot be confined to those situations in which the general principle is used to displace conflicting national rules. Thus, once we accept that the mode of application of the general principle, and of fundamental rights, is independent from the scope of application of the Union law norm that determined its applicability in the first place, then we open the doors to a much broader effect of the Union law general principles. In other words, if there is no longer any equivalence in application between the two (Union norm and general principle) then there is no way we can justify such a difference in application in some cases but not in others. As a result, it is difficult to understand why if a rule falls within the scope of a non-directly effective Treaty provision (eg Article 19 TFEU), it should not attract the application of the general principle; but if the rule falls within the scope of application of a non-(horizontally) directly effective Directive, then it should attract the general principle. Or why, if a Directive cannot impose exclusionary effects, such effects can be imposed by virtue of a general principle which was triggered by that Directive.

Thus, if the *Mangold* case law can be justified, then it is difficult to confine its application to those cases in which national law creates an obstacle to the full effectiveness of a general principle, whether or not such a principle has been enshrined in the Directive which brought the matter within the scope of application of Union law. If we were to be hermeneutically consistent, by virtue of the *Mangold* case law, general principles and fundamental rights would become applicable in all cases falling for whatever reasons within the scope of Union law; and should arguably have both exclusionary and substitution effects; and should be fully applicable against private parties. This would entail a rather major constitutional development, so that something which is not permissible in many national constitutional systems, such as the horizontal application of fundamental rights, might become possible through the medium of Union law. Furthermore, there seems to be no awareness of the fact that, in codifying Union fundamental rights in the Charter, the (Constitutional) legislature clearly intended the Charter to apply only in vertical situations and as a result addressed

⁵¹ See eg K Lenaerts and T Corthaut, ‘Of birds and edges: the role of primacy in invoking norms of EU law’ (2006) 31 ELRev 287; AG Ruiz-Jarabo Colomer, Opinion, Joined Cases C-397 to C-403/01 *Pfeiffer and others* [2004] ECR I-8835.

it only to Union Institutions and Member States. That such a dramatic constitutional development should happen through badly reasoned rulings is then all the more regrettable.

In any event, and even should the *Mangold* case law be limited to determining the lack of applicability of national law falling within the scope of a Directive when the former conflicts with (some?) EU fundamental rights, one should consider whether such a development is desirable. Here, one could recall the well rehearsed arguments against the distinction between exclusion and substitution in relation to the horizontal effect of directives.⁵² Those arguments apply also, if not even more, to fundamental rights. Thus, such a distinction risks being arbitrary, since it is based on random elements upon which private parties have little control, such as whether there is a provision of national law and how that provision is phrased. The end result is both to increase different standards of protection within the EU (all the more problematic in matters relating to fundamental rights) and to increase legal uncertainty so that private parties who have acted lawfully and in good faith might find themselves liable for what is, at the end of the day, a failure of the national authorities. Moreover, the distinction between exclusion and substitution increases this uncertainty because it fails to establish one simple clear rule. So, if we accept the *Mangold* ruling (and the present writer does not) we should be prepared to accept that fundamental rights should be applicable horizontally also in the absence of national rules. Or else, we should reject the constitutional soundness of the *Mangold* approach.

B Fundamental Rights Anyone? Transforming State liability in individual responsibility

In both *Mangold* and *Kücükdeveci*, the Court might have been motivated by the dual desire of maximising the rights of individual claimants, a feature which has become common in post-Citizenship case law,⁵³ and of maximising the effectiveness of Union law, so as to further reduce the scope for Member State's mis- or non-implementation of directives. And yet, two issues need to be considered in this respect. First of all, and as mentioned in the introduction, in cases relating to litigation between private parties the gain in individual rights often translates in a loss for another individual. Mr Mangold's employer would be bound by a contract that in good faith he thought would be terminated after a given period of time;⁵⁴ Ms Küçükdeveci's employer would be liable to pay compensation for having given a shorter notice than what required by the Court. In both cases, the employers acted in compliance with the applicable national law.⁵⁵ In this respect, the fact that

⁵² See eg AG Jacobs' Opinion in Case C-443/98 *Unilever Italia Spa v Central Food Spa* [2000] ECR I-7535; generally M Dougan, 'When Worlds Collide: Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 CMLRev 931.

⁵³ See eg E Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in their Constitutional Context* (Alphen aan den Rijn, Kluwer Law International, 2007), esp chs 5 to 7.

⁵⁴ Of course, and as mentioned above, the litigation in *Mangold* was probably fictitious; and yet, since the national court, and as a consequence, the ECJ, treated it as genuine we must do the same; on the relationship between judicial pronouncements and the (re)writing of history see C Ginzburg *Il giudice e lo storico* (Torino, Einaudi, 1991, reprinted 2006).

⁵⁵ And this is a problem which is common to other areas of Union law, such as the horizontal application of Treaty rights, where the lack of proper implementation of the State translates in liability of a private party.

those effects might be confined to cases of 'exclusion' might, from a legal certainty viewpoint, be even worse since a party that acts following an unambiguous national rule might face disastrous economic consequences by virtue of the, sometime random, application of Union law.

Secondly, this transfer of liability from Member State to individual might signal the fact that the Court no longer considers *Francovich* damages to be an adequate means to remedy the negative effects on individuals arising from the Member State's failure to comply with Union law.⁵⁶ Thus, traditionally, in horizontal situations covered by Directives individuals would need to seek redress from the State since only the State borne the responsibility of implementing Directives. The *Francovich* damages represented a compromise between giving horizontal effects to Directives, and the reality of patchy implementation across the Union's territory. Whilst the conditions imposed by the Court might have made the recovery of damages at times difficult or costly, the solution was not without sense. It provided a financial incentive for correct implementation (which is more effective for the internal market and it eliminates the distorting effect of non-compliance); and it afforded some protection to individuals. However, the *Mangold* case law transfers that financial risk on the individual who, in many jurisdictions, would not even be able to recover the damage from the State through a *Francovich* action since the connection between mis-implementation and damage suffered by the (national) law abiding citizen might be considered too remote.⁵⁷

Thus, the horizontal application of general principles, and fundamental rights in particular, poses significant problems. From a hermeneutic viewpoint the dissonance between trigger and triggered principle is either untenable or should be extended to cover all cases falling within the ambit of Union law. From the perspective of legal certainty the *Mangold* approach makes it impossible for private parties to foresee their obligations as well as transferring liability from the Member State onto them. From a constitutional perspective, this interpretation disregards national constitutional traditions which have so far resisted (for good reasons) the horizontal application of fundamental rights; and in doing so it curtails the discretion of both the Union and the national legislature, limiting the effectiveness of political choices.

VIII CONCLUDING REMARKS

The result of the *Mangold* approach is not to maximise individual rights, but rather to take from some (employers) to give to others (employees and indirectly the State); it is to reduce legal certainty so that mutual rights and obligations can no longer be easily ascertained but are the result of judicial developments which are difficult to conceptualise in a coherent manner; it is to confuse the scope of application of Union law to an extent to which it becomes difficult to predict when and to what extent fundamental rights as general principles of Union law apply. Furthermore, as noted by many Advocates General, this case law also affects the ability of the legislature to lay down detailed rules on the way a given right should be implemented. Finally, following the adoption of the Charter, and the generous approach to rights/principle codification followed therein, the explosive

⁵⁶ Case C-479/03 *Francovich v Italy* [1995] ECR I-3843.

⁵⁷ The same can be said in relation to the *Laval* approach where liability was transferred from the State, who had mis-implemented the posted workers directive, to the trade union which acted in compliance with national law.

potential of this case law should not be underestimated. After all, all rights/principles contained in the Charter are general principles of Union law; and most of those are sufficiently clear to be capable of imposing obligations on individuals. Will all of these rights then have horizontal application? In the writer's opinion, an opinion probably shared by Professor Dashwood given his scepticism about both *Mangold* and an excessive reliance on fundamental rights, the Court should abandon the horizontal application of the general principles and accept that it, by itself, cannot correct all evils of society much less of all constitutional accidents inherent in the Union project. At present the Court risks transforming the constitutional order of States in a constitutional chaos.